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No. 96-823

In The

Supreme Court of the United States
October Term 1996

State of Kansas,

Petitioner

v.

Kym Myers,

Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Kansas

REPLY BRIEF FOR PETITIONER

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STATEMENT

Respondent's brief is most notable for what it does *not* say. First, respondent does not deny the enormous practical significance of the questions presented. Second, he does not dispute, and indeed acknowledges, "that this Court's pronouncements on the dividing line between punitive and remedial statutes represent something less than a precise formula," Brief in Opposition ("Opp.") 9, leading to considerable confusion in the lower courts regarding the appropriate standard to apply in the sex offender registration, community notification and public access context. Third, respondent barely acknowledges, Opp. 11, that this Court currently has pending before it on the merits an *ex post facto* challenge to a sex offender civil commitment statute in *Hendricks v. State*, No. 95-9075 (oral argument, Dec. 10, 1996).

Instead, respondent contends that the Kansas Supreme Court correctly decided the *ex post facto* issue (which respondent essentially concedes this Court has not yet spoken to). *See* Opp. 9. Moreover, respondent asserts that deciding the *ex post facto* issue in this

case would provide no guidance to the lower courts because the Kansas Sex Offender Registration Act, Kan. Stat. Ann. §22-4901 *et seq.*, is just one variation among several sex offender registration, community notification and public access laws in effect in the fifty States. *See id.* at 15-16. These assertions beg the fundamental question which is whether this case presents unresolved, important constitutional issues on which the lower courts are divided. Contrary to respondent's suggestion, this case presents an appropriate vehicle for this Court to resolve an important and unsettled issue that frequently arises in the context of the States' efforts to enact public safety measures affecting sex offenders. The *ex post facto* issue is cleanly and narrowly presented in this case, there are no procedural or other obstacles in the record that would complicate or frustrate this Court's review and the Court would have the opportunity to provide much needed guidance to lower courts attempting to evaluate the constitutionality of numerous State variations of sex offender registration, community notification and public access laws.

1. At a minimum, the Court should hold this petition for disposition following the Court's decision on the merits in *Hendricks v. State*, No. 95-9075, which raises an *ex post facto* challenge to the Kansas sex offender civil commitment statute. In the event the Court reaches and decides the *ex post facto* issue presented in *Hendricks*, it may then be appropriate to consider granting, vacating and remanding the Kansas Supreme Court's decision in this case for reconsideration in light of *Hendricks*. Alternatively, it may be appropriate for the Court to take one or more sex offender registration, community notification and public access law cases, such as this case, in order to address some or all of the important constitutional issues they raise. In any event, it would be premature to dispose of the petition in this case prior to this Court's decision in *Hendricks*.

2. Respondent contends that any uncertainty regarding the appropriate standard for determining what constitutes "punishment" for constitutional *ex post facto* purposes was resolved by this Court's decision in *United States v. Ursery*, 518 U.S. ___, 116 S.

Ct. 2135 (1996). *See* Opp. 9, 12. That assertion simply is not supported by what the Court itself said in *Ursery* or what the Kansas Supreme Court concluded in this case. Indeed, in *Ursery* the Court cautioned that its two-step inquiry might not apply outside the context of a double jeopardy challenge to civil forfeiture proceedings. In particular, the Court opined that "[t]he holding of *Austin* [*v. United States*, 509 U.S. 602 (1993)] was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence." 116 S. Ct. at 2147. Further, the Court distinguished even *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937 (1994), as involving "a tax proceeding under the Double Jeopardy Clause." 116 S. Ct. at 2147. These statements caused the Kansas Supreme Court to opine that "*Ursery* leaves open the question of whether that same [the two-part] test should be used as part of ex post facto analysis." *See* Petition for a Writ of Certiorari, No. 96-823, at 25a. Moreover, in discussing the *ex post facto* issue, respondent cites only one *ex post facto* case, *California Department of Corrections v. Morales*, 514 U.S. ___, 115 S. Ct. 1597 (1995), *see* Opp. 11, while relying almost exclusively on double jeopardy cases. *See id.* at 10-12.

3. Respondent essentially is suggesting that *any* sex offender registration and community notification scheme other than the so-called "tier" systems is a *per se* violation of constitutional *ex post facto* prohibitions. *See, e.g.*, Opp. 15-17. Moreover, respondent is doing so in the face of the fact that the Kansas Supreme Court expressly held that the Kansas Legislature intended the public access provisions to be regulatory in nature and that the law in fact serves important, non- punitive public safety purposes. *See* Petition for a Writ of Certiorari, No. 96-823, at 12a, 16a, 46a. Respondent's suggestion that any system other than a "tier" system is *per se* unconstitutional is untested in this Court and probably unwarranted. Indeed, federal law specifically encourages the States to develop and implement sex offender registration and community notification or public disclosure laws, but it does not direct the

States to adopt any particular system, including the "tier" system. *See* The Violent Crime Control Law and Law Enforcement Act of 1994, 42 U.S.C. §14071 (1994); Megan's Law, H.R. 2137, Pub. L. No. 104-145, 110 Stat. 1345 (1996). Rather, the federal statutes appropriately recognize the important federalism interests at stake in this context and leave the development of the specifications of such systems to the States. The result, as demonstrated in the State's petition for a writ of *certiorari* in this case, is a wide range of variation in the choices the States have made. *See* Petition 17-24.

It seems doubtful that respondent is correct that the Constitution mandates a "tier" system of sex offender registration and community notification or public access, but it is certain that such a proposition has yet to be considered and passed upon by this Court. Indeed, in this context, no single case is likely to permit the Court to resolve all of the constitutional challenges to all of the different state statutory schemes currently in existence. Plenary review in this case, however, will provide substantial and significant guidance to the lower courts with regard to both the appropriate *ex post facto* standard to apply and the potential constitutional limitations on sex offender community notification and public access laws.

CONCLUSION

For the foregoing reasons, The State of Kansas respectfully requests that this Court grant this petition for a writ of certiorari and set this case for plenary review. In the alternative, and at a minimum, this Court should hold this petition for decision following its decision on the merits in *Hendricks v. State*, No. 95-9075, which involves in part an *ex post facto* challenge to the Kansas sex offender civil commitment statute.

Respectfully submitted,

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February, 1997

APPENDIX A

Public Law 104-145
104th Congress

An Act

To amend the Violent Crime Control and Law Enforcement Act of 1994 to require the release of relevant information to protect the public from sexually violent offenders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as "Megan's Law".

SECTION 2. RELEASE OF INFORMATION AND CLARIFICATION OF PUBLIC NATURE OF INFORMATION

Section 170101(d) of the Violent Crime Control and Law Enforcement Act of 1994 (42
U.S.C. 14071(d)) is amended to read as follows:

"(d) RELEASE OF INFORMATION.-

"(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

(2) The designated State law enforcement agency and any local law enforcement agency authorized by the State agency shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.".

Approved May 17, 1996.